MICHAEL PHILIP SPEARS v. KETUA PENGARAH PENJARA KAJANG & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
SM KOMATHY JC
[CIVIL SUIT NO: 21NCVC-34-06-2014]
9 JULY 2014

CONSTITUTIONAL LAW: *Courts – Jurisdiction – Execution of death sentence – Interim stay – Application for – Whether court had jurisdiction to grant stay of execution – Whether indirect way of obtaining injunction – Whether Pardons Board had power to grant stay of execution – Whether prerogative of mercy vested in His Majesty the Yang di-Pertuan Agong – Whether court could grant injunction against Government or its officers – Federal Constitution, art. 42 – Criminal Procedure Code, ss. 281 & 300 – Chiow Thiam Guan & Ors v. Superintendent of Pudu Prison & Anor*

CRIMINAL PROCEDURE: *Sentence – Death sentence – Execution of – Interim stay – Application for – Whether court had jurisdiction to grant stay of execution – Whether Pardons Board had power to grant stay of execution – Whether indirect way of obtaining injunction – Whether prerogative of mercy vested in His Majesty the Yang di-Pertuan Agong – Whether court could grant injunction against Government or any of its officers – Federal Constitution, art. 42 – Criminal Procedure Code, ss. 281 & 300 – Chiow Thiam Guan & Ors v. Superintendent of Pudu Prison & Anor*

On 13 June 2000, the plaintiff was convicted on three counts of murder under s. 302 of the Penal Code. The sentence, however, had not been carried out although the Federal Court had confirmed his conviction and sentence sometime in August 2008. The plaintiff brought this action to challenge the legality of his prolonged detention and delay in the execution of the death sentence. It was argued that his remand and detention for a period of 17 years and two months from the date of his arrest was in breach of art. 5 of the Federal Constitution and constituted a grave injustice to him. *Vide* notice of application dated 13 June 2014, the plaintiff sought for an interim stay of his death sentence pending the final determination of this suit for a declaration, *inter alia*, that his prolonged detention and the delay in the execution of his death sentence was cruel, inhuman and unconstitutional. The defendants, however, argued that only the Pardons Board had the power to allow a stay of execution as expressly provided under ss. 281 and 300 of the Criminal Procedure Code and art. 42 of the Federal Constitution. As such, it was contended that the plaintiff's claim was misconceived in law and not maintainable and thus, an interim stay should not be granted.

Held (dismissing application):

(1) It is common ground that no death sentence can be carried out until the Pardons Board has considered the clemency petition of a convicted criminal. The courts had no jurisdiction to deal with the stay

application since a stay of execution is an extension of the prerogative of mercy which is exercisable only by His Majesty the Yang di-Pertuan Agong in accordance with art. 42 of the Federal Constitution. Granting a stay of the death sentence is an indirect way of obtaining an injunction. Pursuant to s. 29 of the Government Proceedings Act 1956 and s. 54(d) of the Specific Relief Act 1950, the court will not grant an injunction against the Government or any of its officers. As such, the present application was not maintainable (*Chiow Thiam Guan & Ors v. Superintendent of Pudu Prison & Anor*; foll). (paras 30, 31, 33 & 37)

Case(s) referred to:

Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Chiow Thiam Guan & Ors v. Superintendent of Pudu Prison & Anor [1983] 1 CLJ 278; [1983] CLJ (Rep) 92 FC ***(foll)***
Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC ***(refd)***
Earl Pratt v. AG for Jamaica [1994] 2 AC 1 SC ***(refd)***
Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(foll)***
Jamil Harun v. Yang Kamsiah Meor Rasdi & Anor [1984] 1 CLJ 215; [1984] 1 CLJ (Rep) 11 PC ***(refd)***
Juraimi Husin v. Pardons Board of State of Pahang & Ors [2002] 4 CLJ 529 FC ***(refd)***
Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 CA ***(refd)***
Santrughan Chauhan & Anor v. Union of India & Ors (2014) 3 SCC 1 ***(refd)***
Sim Kie Chon v. Superintendent of Pudu Prison & Ors [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC ***(refd)***
Tan Suan Choo v. Majlis Perbandaran Pulau Pinang [1982] 1 LNS 83 HC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3
Criminal Procedure Code, ss. 281(d), 300
Federal Constitution, arts. 5, 42
Government Proceedings Act 1956, s. 29
Internal Security Act 1960, s. 57(1)
Penal Code, s. 302
Rules of Court 2012, O. 18 r. 19
Specific Relief Act 1950, ss. 51, 54(d)

Indian Constitution [Ind], art. 21

For the plaintiff - Gurbachan Singh; M/s Bachan & Kartar
For the defendants - Andi Razalijaya A Dadi; SFC

Reported by Kumitha Abd Majid

JUDGMENT

SM Komathy JC:

[1] On 13 June 2000, the plaintiff was convicted on three counts of murder under s. 302 of the Penal Code together with two others and sentenced to death. The sentence has not been carried out although the

Federal Court had confirmed his conviction and sentence sometime in August 2008.

[2] He brings this action to challenge the legality of his prolonged detention and delay in the execution of the death sentence. This court is called upon to decide on whether a convicted criminal can challenge the legality of his death sentence on these bases. This cause of action is unprecedented in Malaysia but is the subject matter of a ground-breaking Privy Council decision which was followed in India.

[3] By a notice of application dated 13 June 2014, the plaintiff seeks an interim stay of his death sentence pending the final determination of his suit for a declaration that his prolonged detention and the long delay in the execution of his death sentence amounts to cruel, inhuman and degrading punishment and unconstitutional. Consequently, the capital punishment imposed cannot be carried out and that it be set aside and quashed.

Background Facts

[4] The plaintiff and two other accused persons were arrested on 20 February 1997, and later charged with three counts of murder at the Kuala Lumpur High Court. At the conclusion of their murder trial, the court convicted them on all three charges and sentenced them to death on 13 June 2000.

[5] The plaintiff and the two other accused appealed to the Court of Appeal against their conviction. On 21 May 2003, the Court of Appeal dismissed the appeals of the plaintiff and the second accused but allowed the appeal of the third accused who was acquitted and discharged.

[6] The plaintiff's and the second accused's appeal to the Federal Court was dismissed on 1 August 2008 and the sentence of death confirmed. This was five years and ten months ago.

[7] The plaintiff has been in solitary confinement in the 'bilik akhir' for 14 years since 13 June 2000 until today. The execution of the plaintiff was scheduled by the first defendant on 14 March 2014 but for reasons unknown, it was called off.

[8] On 11 June 2014, the plaintiff instituted this action against the defendants, claiming that his remand and detention for a period of 17 years and two months from the date of his arrest was in breach of art. 5 of the Federal Constitution and constituted a grave injustice to him and denied him the right of a speedy trial and a swift execution of sentence. He further alleged that his solitary confinement in the 'bilik akhir' for the past 14 years for about 23 hours per day has caused him to become virtually insane and of unsound mind, and requiring him to undergo psychiatric treatment. It was further averred that by virtue of his prolonged detention, he is virtually serving two sentences; the sentence of death and a life imprisonment.

[9] Based on these facts, the plaintiff seeks the reliefs set forth in para. 18 of his statement of claim:

(i) Declaration that the prolonged, inordinate and inexcusable detention of the plaintiff since 20 February 1997 is inhuman, cruel and/or degrading punishment;

(ii) Declaration that the continued detention of the plaintiff is null and void and bad in law;

(iii) That the sentence to hang until death of the plaintiff be set aside and/or quashed;

(iv) In the alternative, that the execution of the sentence to hang until death of the plaintiff by the defendants be quashed and/or set aside;

(v) Declaration there be no order as to costs; and

(vi) Further or other orders that this honourable court deems fit.

Arguments On Stay

[10] In support of the application for an interim stay, counsel for the plaintiff, Mr Gurbachan Singh ("Mr Bachan") argued that an interim stay was essential to preserve the *status quo* as the question on the legality of a delayed execution of a sentence of death lawfully is a novel point and has received no judicial consideration in Malaysia. He contended that there has been an infringement of the law which required persons under sentence of death to be executed expeditiously. At the outset, Mr Bachan emphasised that the plaintiff was not challenging the final verdict of the Federal Court, but merely the legality of his prolonged detention and delay in the execution of the sentence and its attendant consequences. An interim stay of the sentence was necessary until the final determination of the suit as otherwise the capital punishment may be carried out and the suit would become academic.

[11] Mr Bachan contended that the plaintiff's claim is not frivolous as the basis on which the plaintiff seeks to set aside the death sentence has received judicial approval in other jurisdictions. In this regard, he invited the court to consider the decision of the Privy Council in *Earl Pratt v. AG for Jamaica* [1994] 2 AC 1 and the decision of the Indian Supreme Court in *Shatrughan Chauhan & Anr v. Union of India & Ors* (2014) 3 SCC 1. He also relied on the local case of *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705; [1996] 1 MLJ 209.

[12] In *Earl Pratt*, the Privy Council, on an appeal from Jamaica, considered whether a delay of 14 years in the execution of a death sentence was unconstitutional. There, the appellants argued that the delay was inhuman and rendered the execution unconstitutional and sought for the sentences of the appellants to be commuted to life imprisonment. The argument found favour with the Privy Council. as Lord Griffiths explained (at 29):

> There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we agreed it as an inhuman act to keep a man facing the agony of execution over a long extended period of time. But before their Lordship condemn the act of execution as "inhuman or degrading punishment or other treatment" within the meaning of section 17(1) there are a number of factors that have to be balanced in weighing the delay. If delay is due entirely to the fault of the accused such as an escape from custody or frivolous and time wasting resort to legal procedures which amount to an abuse of process the defendant cannot be allowed to take advantage of that delay for to do so would be to permit the defendant to use illegitimate means to escape the punishment inflicted upon him in the interest of protecting society against crime.

He later concluded (at 35):

> These considerations lead their Lordship to the conclusion that in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute "inhuman" or degrading punishment or other treatment." If, therefore, rather than waiting for all those prisoners who have been in death row under sentence of death for five years or more to commence proceedings pursuant to section 25 of the Constitution, the Governor-General now refers all such cases to the JPC who, in accordance with the guidance contained in this advice, recommend commutation to life imprisonment, substantial justice will be achieved swiftly and without provoking a flood of applications to the Supreme Court for constitutional relief pursuant to section 17(1).

[13] In the next case, *Alcontra*, Edgar Joseph Jr FCJ in deciding not to order a retrial relied on the decision in *Pratt*. He said:

> It is interesting to note that the Judicial Committee of the Privy Council has in *Pratt v. AG of Jamaica* [1994] 2 AC 1 observed (p.35G) that "in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or other treatment""within s.17(1) of the Jamaican Constitution".

[14] In the third case, the Indian Supreme Court held that the inordinate delay in the execution of the death sentence on the accused who was not responsible for the delay, was in violation of art. 21 of the Indian Constitution, which is similar to art. 5 of the Federal Constitution. In commuting the death sentence to life imprisonment, the court observed:

> (42) Accordingly, if there is undue, unexplained and inordinate delay in execution due to pendency of mercy petitions or the executive as well as the constitutional authorities have failed to take note of/ consider the relevant aspects, this Court is well within its powers under Article 32 to hear the grievance of the convict and commute the death sentence into life imprisonment on this ground alone however, only after satisfying that the delay was not caused at the instance of the accused himself ...

A (43) The procedure prescribed by law, which deprives a person of his life and liberty must be just, fair and reasonable and such procedure mandates humane conditions of detention preventive or punitive. In this line, although the petitioners were sentenced to death based on the procedure established by law, the inexplicable delay on account of executive is inexcusable. Since it is well
B established that Article 21 of the Constitution does not end with the pronouncement of sentence but extends to the stage of sentence of death has a dehumanizing effect on the accused. Delay caused by circumstances beyond the prisoners' control mandates commutation of death sentence. In fact, in *Vatheswaran (supra)*, particularly, in para 10, it was elaborated where amongst
C other authorities, the minority view of Lords Scarman and Brightman in the 1972 Privy Council case of *Noel Riley v. Attorney General*, (1982) Crl. Law Review 679 by quoting, "sentence of death is one thing, sentence of death followed by lengthy imprisonment prior to execution is another.

D ...

(54) Therefore, in the light of the aforesaid elaborate discussion, we are of the cogent view that undue, inordinate and unreasonable delay in execution of death sentence does certainly attribute to torture which indeed is in violation of Article 21 and thereby entails as
E the ground for commutation of sentence. However, the nature of delay i.e whether it is undue or unreasonable must be appreciated based on the facts of individual cases and no exhaustive guidelines can be framed in this regard.

[15] Mr Bachan contended that the Privy Council and Indian case law
F cited by him are of persuasive authority and deserve the greatest respect by virtue of s. 3 of the Civil Law Act 1956. (See *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57, *Jamil Harun v. Yang Kamsiah Meor Rasdi & Anor* [1984] 1 CLJ 215; [1984] 1 CLJ (Rep) 11). Until the question of whether the principle which
G these decisions embody can be applied in Malaysia is determined, an interim stay is required to ensure that the death sentence is not carried out by the prison authority.

[16] The defendants opposed the application for the interim stay. The defendants accepted that under common law, long delay in the execution of
H a sentence of death can be challenged, but countered the argument that the principle has application in Malaysia. Senior Federal Counsel, Encik Andi Razalijaya bin A Dadi ("En Hadi"), contended that it was only the Pardons Board that was reposed with the power to allow a stay of execution as expressly provided by ss. 281 and 300 of the Criminal Procedure Code and
I art. 42 of the Federal Constitution. The court was without jurisdiction to interfere with the decision of the Federal Court and Pardon's Board directing that the death sentence be carried out. The plaintiff's claim was thus misconceived in law and unmaintainable and thus an interim stay should not be given.

[17] He relied on the decisions of the Federal Court in *Chiow Thiam Guan & Ors v. Superintendent of Pudu Prison & Anor* [1983] 1 CLJ 278; [1983] CLJ (Rep) 92; [1983] 2 MLJ 116, *Juraimi Husin v. Pardons Board of State of Pahang & Ors* [2002] 4 CLJ 529; [2002] 4 MLJ 529 and the Supreme Court in *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep) 293; [1985] 2 MLJ 385. En Andi submitted that these decisions made it clear that it only the Pardon's Board which was empowered to allow a stay of the death sentence. A B

[18] En Andi had a second string to his legal bow, *viz*, that to allow a stay of the death sentence would contravene the express prohibition in s. 54(d) of the Specific Relief Act 1950 and s. 29 of the Government Proceedings Act 1956 which prohibits the granting of injunctive relief against public authorities. He relied on *Chiow Thiam* and the judgment of the Supreme Court in *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12 ("UEM"). C

[19] Mr Bachan countered that the principle enunciated in *Chiow Thiam* has no application to the present case as he was not challenging the constitutionality of the death sentence. He further took pains to reiterate that he accepted that it is settled law that both the decision for pardon and its decision making process are not justiciable and that he was not challenging the decision of the Pardons Board. He argued that there was no enabling provision that would entitle the plaintiff to seek an interim stay of the sentence from the Pardons Board. D E

The Statutory Provisions

[20] It is necessary to set out the relevant statutory provisions that govern the issue at hand. F

[21] Sections 281(d) of the Criminal Procedure Code reads:

> (i) on receiving the copy of the said order the Court shall cause the effect of the same to be entered in the records of the Court, and when the said order directs the sentence to be carried out shall appoint the time when it is to be carried out and shall endorse the time so appointed on the said order, and shall in all cases cause the order to be carried into effect by issuing a warrant or taking such other steps as may be necessary; G
>
> (ii) the Ruler of the State acting in accordance with Article 42 of the Constitution may order a respite of the execution of the warrant and afterwards appoint some other time or other place for its execution; H
>
> (iii) the warrant shall be directed to the officer in charge of the prison for the district where the sentence is to be carried into effect, who shall carry the sentence into effect, in accordance with law; I

[22] Section 300 Criminal Procedure Code reads:

> (1) When any person has been sentenced to punishment for an offence the Ruler of the State acting in accordance with Article 42 of the Constitution, in which the offence was committed or in

A which the conviction was had may at any time, without conditions, or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to a Ruler for the suspension or remission of a sentence the Ruler may require the convicting Judge or Magistrate to state his opinion as to whether the application should be granted or refused and the Judge or Magistrate shall state his opinion accordingly.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the Ruler by whom it was granted, not fulfilled, the Ruler may cancel the suspension or remission; whereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer without warrant and remanded by a Magistrate to undergo the unexpired portion of the sentence.

(4) Nothing herein contained shall be deemed to interfere with the right of the Ruler of any State to grant pardons, reprieves, respites or remissions of punishment.

[23] Section 54 Specific Relief Act 1950 reads:

An injunction cannot be granted:

(d) to interfere with the public duties of any department of any Government in Malaysia, or with the sovereign acts of a foreign Government;

[24] Article 42 of the Federal Constitution provides in part:

(1) The Yang di-Pertuan Agong has power to grant pardons, reprieves and respites in respect of all offences which have been tried by court-martial and all offences committed in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya; and the Ruler or Yang di-Pertua Negeri of a State has power to grant pardons, reprieves and respites in respect of all other offences committed in his State.

(2) Subject to Clause (10), and without prejudice to any provision of federal law relating to remission of sentences for good conduct or special services, any power conferred by federal or State law to remit, suspend or commute sentences for any offence shall be exercisable by the Yang di-Pertuan Agong if the sentence was passed by a court-martial or by a civil court exercising jurisdiction in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya and, in any other case, shall be exercisable by the Ruler or Yang di-Pertua Negeri of the State in which the offence was committed.

[25] Section 29 of the Government Proceedings Act 1956:

(1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

Provided that:

(a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may *in lieu* thereof make an order declaratory of the rights of the parties; and

(b) ...

(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

Case Law

[26] I now turn to examine the decisions in of *Chiow Thiam* and *UEM* which were placed at the forefront of En Andi's argument to oppose the stay. In *Chiow Thiam Guan (supra)*, the facts of the case were as below:

(i) The appellant filed a statement of claim in which he sought, *inter alia* for (i) a declaration that the mandatory sentence of death passed on him on January 21, 1981 under the provisions of s. 57(1) of the Internal Security Act, 1960 (Revised 1972) was unconstitutional and (ii) stay of execution pending finalisation of the proceedings.

(ii) Hashim Yeop A Sani J (as he then was) granted an application filed by the attorney general under O. 18 r. 19 of the Rules of the High Court 1980 to strike out the claim on the ground that it disclosed no cause of action. The same judge also set aside the order of stay he had himself granted on July 27, 1982.

(iii) At the conclusion of proceedings on August 12, 1982, the appellant applied for stay of execution pending appeal to this court, but the learned judge indicated that such application should be made to the Federal Court.

(iv) Thus, an application was made to the Federal Court.

(v) The learned attorney contended that the court had no jurisdiction to hear the application as jurisdiction can only be conferred by law. It was pointed out that each of the appellants had been tried in a High Court, and their appeals had been dismissed by this court. The Pardons Board had duly considered the sentences imposed, and had decided not fit to interfere with the sentences.

(vi) The attorney general contended that the application for stay should be made to the Pardons Board which alone was empowered to order a respite of the execution of the warrant of execution at that stage.

[27] In dismissing the application for an interim stay, Wan Suleiman FCJ said:

A In this country the prerogative of mercy is vested in His Majesty the Yang di Pertuan Agong.

We also agree with the learned Attorney that we cannot, in any case grant an injunction to restrain the 1st respondent from carrying into effect a sentence in regard to which a warrant has been directed to him
B under section 281 (d)(iii). See *Law Kiat Long & Ors v. Pardons Board Johore* [1968] 2 MLJ 249

Courts are indeed without jurisdiction to deal with this sort of application for the reason so neatly set out in the *de Freitas* case - "Mercy is not the subject of legal rights. It begins where legal rights end." Any stay of execution would be only an extension of the prerogative of
C mercy, exercisable only by His Majesty the Yang di Pertuan Agong in accordance with Article 42 of the Constitution.

(emphasis added)

[28] In *UEM*, the respondent, a member of Parliament and the leader of
D the opposition, applied for a declaration that the letter of intent issued by the government to United Engineers ("UEM") in respect of the North and South Highway contract was invalid and for a permanent injunction to restrain UEM from signing the contract with the government. The respondent also sought an interim injunction against UEM to restrain it from
E signing the contract. The application was refused by the High Court, but the decision was reversed by the Supreme Court on appeal. UEM and the government thereafter applied to set aside the injunction and to strike out the claim. The applications were dismissed. Whereupon, UEM and the Government appealed to the Supreme Court.

F **[29]** The Supreme Court held that the issue of the interim injunction against UEM was absolutely contrary to the express words of s. 29 of the Government Proceedings Act as it had in effect indirectly restrained the government. Salleh Abas LP observed (at 19):

Since the suit against UEM is not maintainable, there is therefore no
G question of the respondent's entitlement to a remedy of declaration and injunction, permanent or otherwise. The interim injunction which was granted against UEM has no legal basis.

Apart from this, the issue of the interim injunction against UEM is absolutely contrary to the expressed words of section 29 of the
H Government Proceedings Ordinance 1956, as it has in effect indirectly restrained the Government. Section 29 is as follows:

...

This means that no injunction could be directly or indirectly issued against the Government or its officers. Similarly, the court
I has no jurisdiction to grant an injunction against a private litigant if the injunction would have the effect of restraining the Government or its officers from performing their functions. This has been the interpretation which has been placed by the courts in England as well as in this country.

And, later added (at 20):

> Refusal to grant the injunction in this case is also consistent with paragraphs (d) and (k) of section 54 of the Specific Relief Act in that no injunction can be granted "to interfere with the public duties of any department of any Government" nor can it be granted "where the applicant has no personal interest in the matter". Personal interest here must surely mean legal interest and not merely political interest.
>
> In this case, since not only has the respondent no cause of action against UEM but the court also has no power to issue the injunction, interim or otherwise, the respondent's suit against UEM is therefore unmaintainable as it is also vexatious, frivolous and constitutes an abuse of the judicial process.

Analysis

[30] I start by observing that there is no evidence before me to indicate when the Pardons Board rejected the plaintiff's clemency petition. It is common ground that no death sentence can be carried out until the Pardon's Board has considered the clemency petition of a convicted criminal. Nor is there evidence to shed light on the reasons why the death sentence was not carried out on the appointed date on 14 March 2014.

[31] There is a long line of decisions that have established that both the decision for pardon and its decision making process are not justiciable. The statement of law laid down by the Federal Court in *Chiow Thiam Guan* that the courts had no jurisdiction to deal with the stay application as a stay of execution is an extension of the prerogative of mercy, which is, exercisable only by His Majesty the Yang di-Pertuan Agong in accordance with art. 42 of the Constitution, is binding on this court based on the doctrine of *stare decisis*. The plaintiff's allegations of inhuman conduct, cruelty and degrading punishment on account of the inordinate delay smack of a plea of mercy which is not the business of this court.

[32] It is fundamental to note that the same arguments taken in this case were considered and rejected by the Federal Court. I see no merit in Mr Bachan's argument that the principle in *Chiow Thiam* has no application because the plaintiff here was not challenging the constitutionality of the death sentence as in that case. His submission overlooks the fact that the application before the Federal Court in *Chiow Thiam* was for an interim stay pending the appellant's appeal against the decision of the trial judge to strike out the appellant's action under O. 18 r. 19 Rules of Court 1980. I do not see how the principle in the above case can be circumvented by taking the position that the plaintiff herein is not challenging the constitutionality of the death sentence.

[33] There is another impediment to the granting of the order. Pursuant to s. 29 of the Government Proceedings Act and s. 54(d) Specific Relief Act, the court will not grant an injunction against the government or any of

its officers. I am further unable to agree with Mr Bachan that an interim stay would not have the effect of granting an injunction. In my view, granting a stay of the death sentence is an indirect way of obtaining an injunction.

[34] I am also unable to agree with Mr Bachan that even if, contrary to his principal submission, the stay would have the effect of granting an injunction, this does not preclude the court from granting the order as the court is empowered to grant temporary or interlocutory injunctions against the government or any of its officers. He found support for this proposition on the basis of the *dicta* of Edgar Joseph Jr J in *Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* [1982] 1 LNS 83; [1983] 1 MLJ 323 that the statutory bar in s. 54(d) of the Specific Relief Act has no application to interim injunctions which are governed by s. 51 of the said Act. Edgar Joseph Jr J stated (at 324):

> in my view, section 54 of the Specific Relief Act, 1950 applies only to applications for perpetual injunctions. It has no relevance to applications for a temporary injunction as in the instant case. This is clear from a reading of Chapters IX and X of the Act which are entitled "of injunctions generally" and "of perpetual injunctions" respectively. Section 54 (d) relied on by Mr. Chandran falls under Chapter X which deals exclusively with perpetual injunctions. Next, section 51(1) which falls under Chapter IX states categorically that "temporary injunctions may be granted for any period of a suit and are regulated by the law relating to civil procedure." This, in my view, makes the Rules of the High Court 1980, applicable and there is nothing therein which constitutes a bar to the granting of an interim injunction against a municipality. I also notice that at pg. 909 of Pollock & Mulla on the Indian Contract & Specific Relief Acts, Eighth Edition, there appears the following short sentence in the commentary entitled "Scope of the Section" on section 56 of the Indian Act which is generally in *pari materia* with section 54 of our Act:
>
> This section gives a list of cases in which a perpetual injunction cannot be granted.

[35] The *dictum* of Edgar Joseph Jr J was approved by the Court of Appeal in *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193 where Gopal Sri Ram JCA observed (at 206):

> The correctness of the decision in *Vethanayagam* [1968] 1 MLJ 283 depends, in our judgment, upon the answer to one crucial question. It is this. Do the provisions of Ch X of Pt III of the Specific Relief Act 1950 (within which fall ss 52 to 55) apply to both interlocutory and perpetual injunctions? In *Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323, Edgar Joseph Jr J answered that question in the negative. His Lordship in that case held that the statutory bar encapsulated in s 54(d) of the Act is confined to perpetual or final injunctions and has no application to temporary injunctions which are governed by s 51 of the Act. He came to that conclusion by reference to the headings appearing in Pt III of the Act. The judicial reasoning in *Tan Suan Choo* is faultless and the interpretative process applied there has the support of respectable

and high authority. Headings, unlike marginal notes, are permissible guides to the interpretation of statutes: *Corporation of the City of Toronto v Toronto Railway Co* [1907] AC 315.

The decision in *Tan Suan Choo* was followed by VC George J in *Bina Satu Sdn Bhd v. Tan Construction* [1988] 1 MLJ 533. Although *Tan Suan Choo* and *Bina Satu* appear to be in conflict with the decision of the Supreme Court in *Penang Han Chiang Associated Chinese* School *Association v. National Union of Teachers in Independent Schools, West Malaysia* [1988] 1 MLJ 302, the approach adopted in both the former and the authorities supporting that approach were never considered by the Supreme Court in Penang Han Chiang. As such, we are not persuaded that the latter overruled both the former *sub silentio*, more so when neither were referred to in the judgment of the Supreme Court. We are of the view that the decision in *Penang Han Chiang* may well have been different if the attention of the Supreme Court had been drawn to the judgments in *Tan Suan Choo* and *Bina Satu*.

In our considered opinion, both *Tan Suan Choo* and *Bina Satu* correctly state the law. It therefore follows that Vethanayagam, in so far as it conflicts with these two authorities is bad law and should no longer be followed. We are fortified in the view that we have taken by the fact that the Federal Court in *Si Rusa* [1985] I MLJ 132 declined to follow and apply Vethanayagam and by the approach laid down in *Tien Ik* [1992] 2 MLJ 689.

[36] It appears that there are two lines of decisions on this area of the law. One adopting the position that prohibition in s. 54(d) of the Specific Relief Act applies only to perpetual or permanent injunctions, and the other taking the position that it applies to both interim and perpetual.

[37] It is to be noted that the view expressed by Gopal Sri Ram JCA in *Keet Gerald* is merely *obiter dicta*. The decisions in *Chiow Thiam and UEM* that the court is precluded from granting an interlocutory injunction against the government and its officers, are binding on me. Applying this principle to the instant case makes the present application unmaintainable.

Conclusion

[38] I am therefore compelled to dismiss the application for an interim stay of the death sentence. There will be no order as to costs having regard to the subject matter of this appeal.

[39] It remains for me to express my appreciation to both counsel for their comprehensive submissions.